Harsh & Costly Lesson from Unilateral Use of E-Discovery Tools

As technological developments have greatly expanded the world of available information, the cost of harvesting electronically stored information (ESI) has risen exponentially. In recent years however, technology has also begun to offer new tools, such as keyword searches and predictive coding, to significantly reduce e-discovery costs. But as the parties learned in *Progressive Casualty Insurance* Co. *v. Delaney,* No. 2:11-cv-0067S-LRH, 2014 WL 3563467 (D. Nev. July 18, 2014), when used unilaterally and without the agreement of opposing counsel or prior approval of the court, these tools can lead to disputes and costs that could have otherwise been avoided. Litigants wishing to reap the increased efficiencies, and reduced costs that e-discovery tools offer, therefore, must remember a cardinal rule: cooperation is king. And that cooperation is necessary for, not an impediment to, achieving the best result one can.

In *Delaney*, Progressive Casualty Insurance Co. *(*Progressive) sued the Federal Deposit Insurance Corporation (FDIC) regarding the takeover of a failed bank. In *Delaney,* the FDIC sought production of ESI. Progressive retained an e-discovery vendor that identified 1.8 million electronic documents. After months of negotiations, the FDIC and Progressive agreed on search terms to run on the ESI, which the court entered in an ESI protocol order. Using the search terms, Progressive identified 565,000 potentially responsive "hit" documents and began manually reviewing them for privilege and relevance. Progressive halted the manual review after a month, however, upon determining that such review was too time-consuming and expensive. Although Progressive then represented to the FDIC that it anticipated making an initial production by the end of September 2013, Progressive missed this deadline and failed to produce any ESI over the next three months. Progressive also rebuffed the FDIC's request for detailed information as to how Progressive intended to produce ESI if not in line with the ESI protocol. Having received neither documents nor information from Progressive as to its alternative proposal for producing ESI, the FDIC filed a motion seeking an order forcing Progressive to produce documents at the end of December 2013.

In its opposition to that motion, Progressive revealed for the first time that, because of the exorbitant cost of a manual review of the 565,000 "hit" documents, Progressive had used predictive coding to review them. Predictive coding is a type of software that can learn to distinguish between relevant and non-relevant documents based on how a human reviewer codes a small subset of documents. This can significantly limit the costs of e-discovery as a human needs to review only a small number of documents as opposed to the entire set.

Progressive had not discussed predictive coding with the FDIC, nor obtained an amendment to the court-approved ESI protocol to permit predictive coding. Predictive coding, however, had reduced the number of potentially relevant responsive documents from 565,000 to 90,575. Progressive proposed to manually review these 90,575 documents for privilege and produce all non-privileged, relevant, responsive documents. Review of this much smaller subset of documents would significantly reduce costs. The FDIC opposed the proposal and asked the court to order Progressive to turn over the initial 565,000 "hit" documents immediately, subject to the clawback provisions in Rule 26 of the Federal Rules of Civil Procedure and the ESI protocol.

The court granted the FDIC's motion to compel. The court noted that, although predictive coding is emerging "as a far more accurate means of producing responsive ESI," the cases "which have approved technology assisted review of ESI have required an unprecedented degree of transparency and cooperation among counsel in the review and production of ESI responsive to discovery." *Delaney,* 2014 WL 3563467 at *8,10. The court then chastised Progressive for utilizing predictive coding without (1) consulting the FDIC, (2) seeking to amend the ESI protocol that Progressive had agreed to, or (3) adhering to the advice/best practices of its e-discovery expert and vendor on predictive coding methodology. *Delaney,* 2014 WL 3563467 at *10-11. The court ordered Progressive to produce all 565,000 "hit" documents subject to the clawback provisions of Rule 26

and the current ESI protocol, but allowed Progressive to apply electronic privilege filters to the "hit" documents and withhold documents identified as "more likely privileged." Progressive would then need to provide a privilege log for a third of the withheld/redacted documents each month for the next three months.

Delaney reinforces the need for transparency and open communication between litigants regarding discovery in the world of ESI–especially where technology-assisted review is undertaken. Any other approach is likely to lead to unnecessary disputes and the incurrence of the sort of costs that use of the e-discovery tools was intended to avoid.

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